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No. [redacted] 205

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

MARATHON OIL COMPANY, a Corporation,
Petitioner,

vs.

GAIL HEATH and THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENTS.

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The Scheffer Press, Inc.—ANdover 3-6850

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STATUTE.

An Act to Amend the Law Condemning Right of Way for Purposes of Internal Improvement, approved June 22, 1852 (Exhibit 2 of Plaintiff-Defendants' Exhibit "A") 6

MISCELLANEOUS.

Constitution of Illinois, 1870, Article II, Section 13 Illinois Revised Statutes, 1965, State Bar Ass'n. Edition, P. 11 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 1387

MARATHON OIL COMPANY, a Corporation,
Petitioner,

vs.

GAIL HEATH and THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENTS.

Respondents, Gail Heath and The Baltimore & Ohio Railroad Company, a Corporation, present this Brief in opposition to the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals, For the Seventh Circuit entered on March 3, 1966.

I.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR A REVIEW ON A WRIT OF CERTIORARI.

Problems of area unitization for oil production usually increase with ownerships and it is probable that the Court of Appeals Judgment will invade Petitioner's convenience.

While this may be considered distasteful, the judgment cannot be logically viewed as a stem to chaos, presenting

special and important reasons for review or justifying further argument that the applicable Illinois Law is contrary to the specific pronouncements of its Supreme Court.

The multitude of oil field titles—varying in source and "quantum of estate"—will exist regardless of this judgment and, of course, legislative processes may be invoked when the public interest demands unit operation of an oil producing area.

II.

THE DECISION IS RIGHT.

A. Fee Title was acquired by the 1853 condemnations.

The Illinois Supreme Court has pronounced that in eminent domain proceedings under the early statutes, here involved, the condemning Railroad Company *did* acquire fee title to the lands condemned.

> *Bartlow* v. *C. B. & Q. R. R. Co.*, 243 Ill. 332, 336, 90 N. E. 721; (1909).
> *Keen* v. *C. C. C. & St. L. Ry. Co.*, 392 Ill. 362, 374, 64 N. E. 2d 499. (1945).

In *Bartlow* (p. 336) it is specifically stated:

> "Under the statute then in force, when property was taken and condemned for public use the condemnation was of the entire property, and the assessment of damages was held to be in satisfaction of all the title to the property, including the fee simple and all lesser estates."

And in *Keen* (p. 374) it is said:

> "The eminent domain act of June 22, 1852, referred to in Section 4 of the Special Act creating the Cairo & Vincennes Railroad Company, was construed by this Court in *Bartlow* v. *Chicago, Burlington & Quincy*

> *Railroad Co.*, 243 Ill. 332, 90 N.E. 721 (1909). It was there held that in eminent domain proceedings under said Act, the railroad company condemning the land acquired fee simple title to the lands condemned •••".

These authorities are neither overruled nor changed and stand as Illinois Law applicable in this case.

The Illinois policy and law of condemnation *was* changed by the 1870 Constitution. Section 13 of Article II provides:

> "Private property shall not be taken or damaged for public use without just compensation. Such compensation, where not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners subject to the use for which it is taken." (Ill. Rev. Stats. 1965 Bar Ass'n. Ed. p. 11)

The Illinois Eminent Domain Act was thereafter adopted and "approved April 30, 1872. L. 1871-2, p. 402". (Ill. Rev. Stats., 1965, Bar Ass'n. Ed. Ch. 47).

It is axiomatic that condemnation decisions or legal pronouncements predicated upon or influenced by this changed policy and law of condemnation are not applicable herein.

In *Peoria & Rock Island R. R.* v. *Birkett*, 62 Ill. 332, 336-337 (1872), it is said:

> "The charter of the company, granted March 7, 1867, provides: that all real estate taken, condemned, or appropriated, for the right of way, shall be held by the company in fee simple.
>
> The present constitution provides: that the fee of land taken for railroad tracks, without the consent of the owners, shall remain such owners, subject to the use for which it was taken. Art. 2, Sec. 13.

"The proceedings for condemnation were commenced prior to the adoption of the constitution; and the question raised is, whether upon the facts the company will obtain the fee, or only the use of the land.

"The first section of the schedule of the constitution saves all actions, prosecutions, etc., of individuals or bodies corporate, and makes them as valid as if the constitution had not been adopted.

"We do not decide as to the effect of the constitution upon the charter of the company; but are of the opinion that, as the company had commenced proceedings for condemnation before the adoption of the constitution, such proceedings were continued as valid, and must be governed by the charter."

In *Toledo, Peoria and Warsaw Railway Co.* v. *Pence*, 68 Ill. 524, 528-530 (1873), it is said:

"We are not apprised of any general law, in force in this State, prohibiting stock from running at large, nor of any statute modifying the act of 1855. Appellants contend that it is virtually repealed by the constitution, and the Eminent Domain Act, passed in conformity thereto, in force July 1, 1872. It is urged that the law of 1855 was based on the principle that railways were the absolute property of the railroad company—their private property—as fully so as the adjoining farms were the property of their respective owners; that when they condemned the right of way the fee vested in them, and, being such absolute owners, it was right they should be held rigidly to the fulfillment of their contracts with adjoining owners.

"It is then urged, that the new constitution changed the old rule and established new principles in the management of railroads, by section 12, of Article 11, they are declared public highways; and by Section 13, of Article 2, the fee of land taken for railroad tracks, without consent of the owner thereof, remains in such owner, subject to the use for which it is taken.

"As to the declaration in the constitution, that railways are public highways, they are so, as defined by this Court in *The Central Mil. Tract R. R. Co.* v. *Rockafellow,* 17 Ill. 541. They are not common highways in the sense of public wagon roads, upon which every one may transact his own business with his own means of conveyance, but only in the sense of being compelled to accept of each and all, and take and carry to the extent of their ability.

"By this clause in the constitution we fail to see any design on the part of its framers to relieve these companies from any liability imposed upon them by prior legislation. They will remain liable to the requirements of the acts of 1855 and 1869.

"As to the other clause, the facts in this case show the right of way of this company was acquired, if at all, long anterior to the adoption of the present constitution. The proof is, the killing took place in August, 1872, and the road had been opened for use more than six months prior thereto. *The company, then, had the fee in the right of way, as we must presume,* nothing being alleged or shown to the contrary. But whether they owned the fee or a perpetual easement, they were bound to fence the line of their road, and failing to do so they become liable in damages, without any proof of actual negligence. Negligence, in such cases, is presumed." (Emphasis Ours)

Bonner et al v. *Peterson,* 44 Ill. 253 (1867), considers the effect of land condemnations prior to the 1870 constitution. The Illinois Supreme Court in its opinion (44 Ill. p. 258) states:

"When property is so taken and condemned, *it must be presumed,* that *the commissioners condemned the entire property and title thus appropriated,* unless their report shows the contrary. *And the assessment of the damages,* unless it otherwise appears, *must be held to be in satisfaction of all the title to the prop-*

erty, including the fee simple, and all lesser estates." (Emphasis Ours)

The condemnation proceedings here under consideration reflect a clear intent to take and a taking of the fee, and all lesser estates. Certainly, there is no language which can logically overcome the legal presumption to that effect.

Petitioner's assertion to the contrary is first based upon the false premise that "right of way" as used in the "Act To Amend the Law Condemning Right of Way for Purposes of Internal Improvement, approved June 22, 1852" is but an easement and not a tract of land subject to acquisition in fee.

The term "right of way" as applied to a railroad company has a twofold signification—"a right of crossing and a strip of land which a railroad takes upon which to construct its railroad". *Joy* v. *City of St. Louis,* 138 U. S. 1, 34 L.Ed. 843-857 (1890); *Missouri K. & T. Co.* v. *Roberts,* 152 U. S. 114, 116, 38 L. Ed. 377, 379 (1893); *New Mexico* v. *U. S. Trust Co.,* 172 U. S. 171, 182 43 L. Ed. 407, 411 (1893).

From a reading of the "Act to Amend the Law Condemning Right of Way for Purposes of Internal Improvement, approved June 22, 1852" it becomes apparent that "right of way" as there used, is the "strip of land which a railroad company takes upon which to construct its railroad".

The Illinois Supreme Court so holds and such broad usage of the term "right of way" has official recognition in the specific policy change brought about by the 1870 Constitution.

Petitioner relies heavily upon *Tallman* v. *Eastern Illinois and Peoria R. R.*, 379 Ill. 441, 446-447, 41 N. E. 2d 537, 540 (1942) which construes a 1912 "right of way deed" to the railroad company "as and for its right of way, a strip of land * * *". The opinion was delivered in 1942 by Justice Gunn who was on the Illinois Court and concurred in the January, 1946 opinion of *Keen* v. *C. C. C. & St. L. Ry. Co.*, 392 Ill. 362, 64 N. E. 2d 499 (1945). It is lengthy and contains much dictum but with reference to the applicable rules of construction states: "The cardinal and all important one is to ascertain the intention of the parties, and such deed should be so construed as to carry out the intention as gathered from the entire instrument, and the purpose, if legal, should be carried into effect so as to not defeat the manifest intention * * * and every word and clause within the instrument should be considered, and if possible given effect; * * *"

Other "deed construction cases", without application but cited by Petitioner, are: *Kurz* v. *Blume*, 407 Ill. 383, 385, 95 N. E. 2d 338, 339 (1950), *Carter Oil Co.* v. *Welker*, 317 U. S. 592 (1942), *Hicks* v. *Thomson*, 127 Fed. 2d 1001 (7th Cir. 1942), Cert. den. 317 U. S. 659 (1942), Reh. den. 317 U. S. 708 (1942); *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, 520-521, 30 N. E. 2d 24, 26-27 (1940); *Texas Co.* v. *O'Meara*, 377 Ill. 144, 150-152, 36 N. E. 2d 256, 258-259 (1941); *Carter Oil Co.* v. *Myers*, 105 Fed. 2d 259, 261 (7th Cir. 1939).

Petitioner does cite a number of cases involving condemnations.

An early Illinois condemnation (one prior to the 1870 Constitution) is the subject of *Tacoma Safety Deposit Co.* v. *City of Chicago*, 247 Ill. 192, 93 N. E. 153 (1910). The decisive factor there is found in the Court's statement:

> *"This property was condemned in 1851 and at that time there was no statute in force in this state expressly authorizing a city to take the fee of real estate for street purposes,* and we think the law is clear that before the city could acquire the fee to said real estate for street purposes it must appear that there was a statute in force which by its terms or by necessary implication, authorized the city to take said property in fee, for the purpose of widening said street" (247 Ill. 197) (Emphasis Ours).

Here, the railroad was expressly authorized to acquire the fee and, in fact, directed to do so if unable to acquire the real estate, or an acceptable interest therein, through a voluntary grant. The fee title is not dependent upon the existence or exercise of an implied right. Consequently, the "strict construction rules", to which Petitioner alludes, are without application.

In *Miller* v. *Commissioners of Lincoln Park,* 278 Ill. 400, 406, 116 N. E. 168, 181 (1917), the Court said:

> "Without discussing the question of the title acquired by condemnation for general park purposes, we do not agree with the contention that the condemnation of lands for the purpose of driveways vests the fee in such lands in the commissioners."

The statute *there* under consideration did not "expressly" define "the estate to be taken" and for that reason the Court applied and followed its opinion in Tacoma.

Illinois Central Railroad Co. v. *City of Chicago,* 135 Ill. 453, 28 N. E. 740 (1891) holds that the municipality did not acquire the Railroad Company's fee through an 1888 condemnation pursuant to "Clause 89 of Section 1, Article 9 of the statute relating to Cities and Villages".

Illinois State Trust Co. v. *St. Louis I. M. & S. Ry. Co.,* 208 Ill. 419, 70 N. E. 357 (1904), involves a 1903 condem-

nation proceedings and holds that a motion to dismiss should have been allowed for the reason that "a foreign corporation cannot exercise power of eminent domain under the Act of 1899" etc.

Superior Oil Co. v. *Harsh,* 39 F. Supp. 467 (7th Cir. 1942) holds that Trustees of a School District organized in 1886 had acquired through adverse possession no more than the limited title obtainable by condemnation under the particular statute involved and that the evidence did not justify any presumption of a lost deed to their asserted fee.

Sears v. *City of Chicago,* 247 Ill. 204, 93 N. E. 158 (1910) holds that, for non-compliance with "the 1833 Law", there had been but a common law dedication of the particular streets; that the abutting lot owners therefore "took the fee to the center of the streets"; and that "the 1843 curative Act" did not sustain the City's asserted fee because "The Title of the abutting owners who purchased" "prior to the passage of the Act of 1843" "had become vested to the center of the streets" and to give the contended effect "would be to deprive such abutting owners of their property without due process of law."

In *Illinois Trust and Savings Bank* v. *Chicago,* 247 Ill. 264, 266; 93 N. E. 167 (1910), it is said: "The principles involved in this case are fully discussed in the opinions filed in the cases of *Sears* v. *City of Chicago* (1910), *supra,* and *Tacoma Safety Deposit Co.* v. *City of Chicago* (1910) (*ante* p. 192.)"

Wisconsin Screw Co. v. *Firemans Fund Insurance Co.,* 297 F. 2d 697 (7th Cir. 1962) and *Shackleton* v. *Food Machinery & Chemical Corp.,* 279 F. 2d 919 (7th Cir. 1962) are cited for the proposition that "The District Court's considered view as to the law of the state in which it sits

is entitled to great weight and will be accepted on review unless shown to be clearly wrong". The District Court issued no opinion but simply adopted the findings, conclusions and decree submitted by counsel for Appellee—without change of word or explanation. Furthermore, "the law of the State" as so represented and adopted *is* "shown to be clearly wrong".

These cited cases have nothing to do with the Illinois Statutes or early railroad condemnation proceedings here under consideration.

It is inconceivable that Petitioner's counsel can urge the application of such cases and then argue that "The cases relied upon by Respondents do not hold what they contend and have no application".

Petitioner concedes the Illinois Supreme Court statements that a railroad condemning under the 1852 statute thereby acquired a fee simple title to the lands condemned but asserts that they "are obiter dicta and not controlling authority for the case at bar".

A fair and comprehensive reading of these cases impels a conclusion that the language is not obiter dicta or subject to classification as an unnecessary statement of the opinion author rather than the considered decision of the Court. Otherwise, the Illinois Supreme Court would not have specifically said in *Keen* v. *C. C. C. & St. L. Ry. Co.*, 392 Il. 362, 374 (1945) that:

> "The eminent domain act of June 22, 1852, referred to in Section 4 of the Special Act creating the Cairo & Vincennes Railroad Company, was construed by this Court in *Bartlow* v. *Chicago, Burlington & Quincy Railroad Co.*, 243 Ill. 332 (1910). *It was there held that in eminent domain proceedings under said Act, the railroad company condemning the land acquired*

> *fee simple title to the land condemned.* The rights in and the power to take real estate by condemnation, contemplated by the eminent domain act referred to in Section 4, was the right to take and acquire fee simple title". (emphasis ours)

This quotation removes any reasonable question as to the intents, purposes and true character of the court's pronouncement in such respect. As stated in *Scovill Manf. Co.* v. *Cassidy,* 275 Ill. 462, 470 (1916), *"we do not think the rule laid down * * * was dictum, but even if it was, it was the expression of opinion upon a point in a case deliberately passed upon by the court and should be held as judicial dictum rather than mere obiter. (Law* v. *Grommes,* 158 Ill. 492; *Rhoads* v. *Chicago and Alton Railroad Co.,* 227 id. 328)".

B. There is no proof of title loss through adverse possession.

The District Court, in addition to ruling that no fee ownership was acquired by the condemnations, ruled that Respondents had lost the South 29 feet of the tract through abandonment and adjoining landowners adverse possession.

This ruling was also reversed for want of evidence to prove the charges of abandonment and adverse possession as required by Illinois Law.

It is now argued that the Court of Appeals correctly stated but misapplied the Illinois Law and "completely overlooked important Illinois cases involving directly the question of adverse possession of railroad rights of way in which the facts are almost identical to those in the case at bar and the issues were found against the railroad. *Donohue* v. *I. C. R. R.,* 165 Ill. 640, 46 N. E. 714 (1897); *I. C. R. R.* v. *Houghton,* 126 Ill. 233, 18 N. E. 301

(1886); *I. C. R. R.* v. *O'Connor,* 154 Ill. 550, 39 N.E. 563 (1895)".

In each of these cases, said to have been overlooked, the adverse possession was clearly established. *Here,* there is no evidence to support the District Court's finding. Particularly is this true in light of the presumption favoring a legal title. *Superior Oil Company* v. *Harsh,* Fed Supp. 467, Aff'd 126 Fed. 2d 572 (7th Cir. 1942); *White* v. *Harris,* 69 N. E. 519, 206 Ill. 584 (1904); *Towle* v. *Quante,* 92 N. E. 967, 246 Ill. 568, 574 (1910); the clear and convincing evidence required to defeat a legal title by statute of limitations. *Chicago & Northwestern Ry. Co.* v. *Kennedy,* 176 N.E. 267, 344 Ill. 309, 317-318 (1931); *Duck Island Hunting etc.* v. *Whitnah,* 137 N.E. 840, 306 Ill. 284, 289-292 (1923); *Illinois Central R. R. Co.* v. *Hasenwinkle,* 83 N. E. 815, 232 Ill. 224 229-230 (1908) and the rule that possession which is not hostile or adverse cannot ripen into title however long it continues. *Siegle* v. *Criss,* 144 N.E. 307, 312 Ill. 617, 624 (1924); *Purtle* v. *Bell,* 80 N.E. 350, 225 Ill. 523, 528 (1907); *Mitchell* v. *I. C. R. R. Co.* 51 N. E. 2d 271, 384 Ill. 258, 270 (1943), including the rule that permissive possession or use of land to which another holds the legal title cannot be the basis of a claim to title by adverse possession. *Nitterauer* v. *Pulley,* 82 N. E. 2d 643, 401 Ill. 494, 503 (1948); *I. C. R. R. Co.* v. *Noyes,* 96 N. E. 830, 252 Ill. 178, 182 (1911); *Busch* v. *Huston,* 75 Ill. 343, 347 (1874); *Jones* v. *Scott,* 145 N. E. 378, 314 Ill. 118, 122-123 (1924); *Hankey* v. *Van Scyoc,* 338 Ill. 533, 536 (1930).

It is significant that Petitioner fails to specify any supporting evidence or undertake to explain away the testimony of its own witnesses that the now deteriorated fencing was to keep livestock off the track and protect them against death or injury by train (Dft-Ap't. C. A.

App. 115, 117, 124-125, 131-134); that most of the 29 foot strip was dotted with trees and overgrown with brush (Dft-Ap't. C.A. App. 91); and that the trees and brush covered area had never been cultivated (Dft-Ap't. C.A. App. 91).

CONCLUSION.

The Petition for Writ of Certiorari fails to demonstrate any valid reason for a further review of this case. We therefore urge that the Petition should be denied.

Respectfully submitted,

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